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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,
Petitioner,

v.

JOHN LISI, ETC., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE
and
BRIEF FOR THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The United Kingdom of Great Britain and Northern Ireland moves this honorable Court for leave to file the attached brief as *amicus curiae* in support of the petition for a writ of certiorari in the above entitled cases.

Counsel for the petitioner has consented to the filing of this brief, but counsel for the respondent has refused consent. Accordingly, leave of this Court is sought under the terms of Rule 42 of the Court's Revised Rules.

The nature of the movants' interest, and its reasons for believing that these cases present an issue of grave international concern, are set forth in the attached brief.

Respectfully submitted,

For the UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND,
by its attorney

EDWIN LONGCOPE
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BRIEF FOR THE UNITED KINGDOM AS AMICUS CURIAE

Introduction

The United Kingdom of Great Britain and Northern Ireland respectfully submits this brief as *amicus curiae* in support of the petition of Alitalia-Linee Aeree Italiane, S.p.A. ("Alitalia") that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit, entered in the above entitled cases on December 16, 1966, 370 F. 2d 508.

I. The Nature of the Interest of The United Kingdom

The United Kingdom is one of some ninety contracting countries party to the Warsaw Convention of 1929[1], to which the United States of America is also a party. It is

[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Concluded at Warsaw, October 12, 1929, 49 Stat. 3000. T. S. 876.

the interest of the United Kingdom that the United States of America, and all other contracting parties, should give effect to the Convention in accordance with its express terms, and that the uniformity of law which the Convention establishes should not be destroyed by the construction placed upon the terms of this treaty by the courts of a contracting party.

It has been noted by one authority[2] that the decision herein by the District Court, affirmed by a majority of the Court of Appeals, is "breaking a chain of hundreds of precedents". It is also noted that the judgments of the Courts below on the point at issue are in conflict with the official position of the United States Government, taken at the Hague Conference in 1955[3], that Article 3(2) of the Warsaw Convention does not require that "notice" be given in the passenger ticket as to the applicability of the Convention limits of liability.

The government of the United Kingdom therefore considers that the resolution of the issue presented by the judgments below is of deep concern to the United Kingdom, as one of the contracting parties to the Convention, that these judgments should not be permitted to stand without review by this honorable Court.

II. The Proceedings Below

These cases involve claims on behalf of passengers on an Alitalia aircraft which crashed on February 26, 1960,

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[2] Lowenfeld & Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497 (1967).

[3] The Hague Protocol extended the scope of sanctions under the Warsaw Convention to failure to give notice on the passenger ticket of Convention limits of liability. However, the United States has not ratified the Hague Protocol and hence there was no requirement here that the passenger ticket contain such notice, though in fact it did.

while en route from Rome to New York. The passenger tickets were the IATA uniform passenger ticket, heretofore approved by the Civil Aeronautics Board,[4] and which is the standard ticket for virtually all international air traffic. The ticket contained notice thereon that it was subject to the provisions of the Warsaw Convention.

The District Court held that the size of type used in the "notice" provision was so small as to be "virtually invisible", that it did not therefore give adequate notice of the applicability of Convention limitations on liability, was not in compliance with the provisions of Article 3(1)(e) of the Convention, and that the defendant carrier was therefore denied the limitations on liability granted by Article 22 of the Convention.[5]

The majority of the Court of Appeals, in affirming the judgment of the District Court, observed that the terms of the Convention were "arbitrary limitations on liability—which have been severely and repeatedly criticized . . ."[6] They further noted that "a judge could not reasonably have found that the tickets and baggage checks gave the passengers the required notice."[7] Judge Moore, dissenting in the Court of Appeals, stated that "the majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it."[8]

The judgment below therefore seeks to import into Article 3(1)(e) of the Convention a provision not to be

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[4] See *Pan American World Airways, et al.* v. *Conditions of Carriage,* 24 C. A. B. 575 (1957).

[5] *Lisi* v. *Alitalia-Linee Italiane,* 253 F. Supp. 237, 243 (SDNY, 1966).

[6] *Lisi* v. *Alitalia-Linee Aeree Italiane,* 370 F. 2d 508, 512 (CCA 2d, 1966).

[7] *Id.* at 514.

[8] *Id.* at 515.

found therein, i.e., a provision as to the size of type which must be employed to give "notice", and a second provision not to be found in the wording of the said Article, i.e. that the failure to give such "notice" by a larger, and what the Court considers to be a more readable size of type, the carrier is thereby deprived of the limitations on liability provided in Article 22 of the Convention.

The provision which the Courts below would seek to write into the Convention is one which was considered and rejected by the original drafters of the Convention, who declined to extend the imposition of sanction to failure to include a notice provision in the passenger ticket.[9]

This provision which the Courts below would insert is also contrary to the position taken by the United States Government at the Hague Conference of 1955 in proposing to amend Article 3(2) of the Convention to impose sanction . . . *"if the ticket does not include the notice required by paragraph 1(c) of this Article, . . ."* (Emphasis added).[10] This proposed amendment, which was adopted as the Hague Protocol, has not been ratified by the United States and is therefore not applicable here.

The decision below also ignores the fact that the Hague Conference of 1955 considered and rejected a proposal by the United States to fix the size of letters in the notice provision.[11]

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[9] See, Heme Conference Internationale de Droit Prive Aerien, ICAO Doc. 7838, pp. 100-101, 129, 168 (1930).

[10] Volume I, International Conference on Private Air Law, ICAO Doc. 7686 LC/140, p. 134 (1955).

[11] At the Hague Conference of 1955 the United States proposed that the Protocol specify that the notice provision therein "be set out in letters of not less than five millimeters high." The Conference rejected this proposal. Volume 1, Minutes, International Conference on Private Air Law, The Hague, September, 1955, ICAO Doc. 7686—LC/140, page 124.

III. Reasons For Granting the Writ

The fundamental purpose of the Warsaw Convention, as the preamble indicates, was to establish uniform documentation and provisions as to liability in international air transport.[12] This purpose would be defeated by the unilateral interpretation placed upon the provisions of Article 3(1)(e) by the courts of one of the contracting parties. The way would be opened to varying or differing interpretations by the courts of other contracting countries, which would reduce the Convention to a meaningless shambles. The end result could only be to impugn the integrity and good faith of countries signatory to such treaties and defeat the essential need for a uniform scheme of applicable law in the field of international air transportation.

The comments of the majority of the Court of Appeals, in criticizing the Convention as "arbitrary" and giving a "one-sided advantage" to the carrier[13] manifest the majority's dislike for the Convention's limitations on liability and supply the motivation for their decision upholding the judgment of the District Court. This action by the majority is aptly characterized by Judge Moore in his dissenting opinion, wherein he stated:

> "The majority in their opinion indulge in judicial treaty making.
>
> * * *
>
> The majority do not approve of the terms of the treaty and, therefore, by judicial fiat, they rewrite it. They think a 'one-sided advantage' is being taken of

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[12] "[The High Contracting Parties]: Having recognized the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier . . . have concluded and signed the following convention:" 49 Stat. 3014 (1934).

[13] 370 F. 2d 508, 512-513.

> the passenger which must be offset by a judicial requirement that the passenger have notice of the limitation of liability."[14]

It is considered by the Government of the United Kingdom that the decision of the majority of the Court of Appeals, based as it was upon their manifest dislike for the limited liability provisions of the Convention, exceeds the proper bounds of judicial interpretation of treaties. Reference is made on this point to the cases cited in the brief filed herein on behalf of the International Air Transport Association, as *amicus curiae,* and particularly to the quotation, on page 11 of its brief, from the decision of this Court in *Maximov* v. *United States,* 373 U. S. 49, (1962), wherein this Court stated, at page 54:

> ". . . it is particularly inappropriate for a court to sanction a deviation from the clear import of a solemn treaty between this Nation and a foreign sovereign, when, as here, there is no indication that application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories."

The government of the United Kingdom joins in the statement of Judge Moore in his dissent below that

> "The language of the treaty is clear. Its provisions are not difficult to comprehend. Its mandates are simply stated. Ascertainment of compliance should, therefore, present no real problem."[15]

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[14] Id. at 514.

[15] Id. at 515.

CONCLUSION

The issue presented in the instant cases far transcends the mere question whether the type used on the "notice" provision of the standard passenger ticket is of sufficient size to be readable and hence to give adequate notice thereof. The real issue is whether the decision of the majority of the Court of Appeals is in direct conflict with the express provisions of the Warsaw Convention and whether the courts of a contracting nation may, because of their disapproval of the Convention, rewrite it by judicial fiat. Such unilateral action by the courts of the United States of America is in direct conflict with the position taken by the Government of the United States at the Hague Conference of 1955 that the sanction of unlimited liability does not apply where the passenger ticket does not make reference to the applicability of the Warsaw Convention. It is in conflict with the refusal of the United States to ratify the Hague Protocol, proposed by the United States and adopted by the Hague Conference of 1955, which provides that the sanction of unlimited liability shall apply if the passenger ticket does not give notice of the applicability of convention limits of liability.

If the decision of the majority of the Court of Appeals is to be confirmed the Government of the United Kingdom is concerned that it shall have to take appropriate action to protect its carriers from the unlimited liability ensuing therefrom.

It is therefore respectfully urged that the petition of Alitalia for a writ of certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of this motion and the attached brief have been served upon

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Such service was made by posting the foregoing documents by first class mail.

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